Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

No. 95-1773

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF TEXAS, ET AL., PETITIONERS

v.

CHERYL J. HOPWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the University of Texas School of Law may not constitutionally consider race or national origin as a factor in its admissions process.

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INTEREST OF THE UNITED STATES

The United States Department of Education has primary responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The Department's regulations and policy guidance interpreting Title VI provide that educational institutions may take race into consideration for the purposes of remedying past discrimination or enrolling a diverse student body. See 34 C.F.R. 100.3(b)(6)(i); 59 Fed. Reg. 8756, 8759-8762 (1994).

The Department of Education's Office for Civil Rights has engaged in efforts to eliminate the vestiges of the dual systems of higher education that previously were operated by a number of States, including Texas. The

United States Department of Justice is participating in Title VI litigation to desegregate the systems of higher education in Mississippi, Louisiana, Alabama, and Tennessee. The United States has a strong interest in desegregating institutions of higher education and in ensuring that the States are not hampered in their efforts to remedy the effects of unconstitutional discrimination on those systems.

STATEMENT

1. In 1946, acting pursuant to the requirements of the Texas Constitution,[1] the University of Texas School of Law (the Law School) denied admission to Heman Sweatt, a black man, solely on account of his race. This Court reversed that decision, unanimously rejecting the assertion that an unaccredited, makeshift law school that Texas had established for blacks could provide Sweatt with an equal educational opportunity. *Sweatt* v. *Painter*, 339 U.S. 629 (1950). Sweatt thereafter became the only non-white student in the Law School. He left the school in 1951, without graduating, because of severe racial harassment from his classmates and professors. Pet. App. B6.

After *Sweatt* was decided, the University of Texas continued officially to discriminate against black and Mexican-American students with regard to housing and facilities. Enforced segregation pervaded the State's entire educational system well into the 1960s. Texas responded to *Brown* v. *Board of Education*, 347 U.S. 483 (1954), with a policy of official resistance to the integration of its public schools, Pet. App. B4, and as recently as the 1980s some Texas school districts continued to

[1] Tex. Const. art. VII, § 7 (repealed 1969) (requiring the maintenance of "separate schools * * * for the white and colored children").

practice overt race-based segregation, see, *e.g.*, *United States* v. *Crucial*, 722 F.2d 1182, 1184-1185 (5th Cir. 1983). In many Texas school districts, the effects of prior *de jure* segregation continue to manifest themselves in segregated schools. Pet. App. B4.

2. In the late 1970s, the Department of Health, Education and Welfare's Office for Civil Rights (OCR) began an investigation of the Texas public higher educational system, pursuant to the court order in *Adams* v. *Richardson*, 356 F. Supp. 92 (D.D.C.), aff'd as modified, 480 F.2d 1159 (D.C. Cir. 1973). OCR found that Texas had failed to eliminate the vestiges of its dual higher education system. It began negotiations with the State to bring it into compliance with Title VI by removing those vestiges. Pet. App. B7-B8. In 1983, Texas submitted a desegregation plan acceptable to OCR. That plan included both a general commitment "to seek to achieve proportions of black and Hispanic graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs," and a specific commitment by the University of Texas to increase the number of black and Hispanic college graduates entering its graduate and professional schools. *Id.* at B9 n.6. OCR (now within the Department of Education) has committed to evaluating whether, in light of *United States* v. *Fordice*, 505 U.S. 717 (1992), the State has eliminated all vestiges of its former *de jure* segregated higher education system. See 59 Fed. Reg. 4271, 4272 (1994); Pet. App. B9-B10.

The Law School first initiated affirmative efforts to include minorities in its student body in the late 1960s, almost 20 years after *Sweatt* was decided. Pet. App. B11. The Law School discontinued this program in 1971; it

consequently admitted no black students that year. *Id.* at B12. Since then, its affirmative action efforts have taken various forms. In 1992, the year respondents were denied admission, a minority admissions subcommittee reviewed the files of all black and Mexican-American applicants and used lower presumptive admissions standards (based on standardized test scores and college grade-point averages) for them. The subcommittee presented recommendations to the full admissions committee, which accorded them dispositive weight. *Id.* at B17-B25.

3. Respondents, three white men and one white woman, were denied admission to the Law School in 1992. They filed suit in the United States District Court for the Western District of Texas, alleging that, "by favoring less qualified black and Mexican American applicants," defendants discriminated against them on the basis of race, in violation of the Fourteenth Amendment; Title VI; 42 U.S.C. 1981 and 42 U.S.C. 1983. Pet. App. B2. After an eight-day bench trial, the district court concluded that two of the purposes set forth in the Law School's "Statement of Policy on Affirmative Action" (see *id.* at B39) were sufficiently compelling, under strict scrutiny, to support race-conscious admissions practices: (1) achieving the educational benefits of a diverse student body; and (2) remedying the present effects of past discrimination in the Law School and in Texas's educational system as a whole. *Ibid.*[2] Although the court

[2] The court concluded, based on the evidence at trial, that a diverse student population provides substantial educational benefits "for all members of a law school class." Pet. App. B25. The court also found that the continuing effects of the Law School's own past discrimination presented "a strong evidentiary basis for concluding that remedial action is necessary." *Id.* at B43. Observing, moreover, that "[t]he State's institutions of higher education are inextricably linked to the primary and secondary schools in the system," *ibid.*, the court found an additional compelling remedial interest in redressing the effects of the discrimination that pervaded the Texas educational system as a whole, *id.* at B46.

observed that "[a]lternatives, such as minority scholarships and increased minority recruitment" are "effective tools in conjunction with the affirmative action program," it concluded that those measures "would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect[s] of past *de jure* segregation." *Id.* at B47-B48.[3]

The district court determined, however, that the Law School's use of a separate minority subcommittee effectively precluded individual comparisons between minority and nonminority applicants and thus did not satisfy the narrow tailoring requirement of strict scrutiny. For that reason, the court held that the Law School's 1992 admissions practices violated respondents' right to equal protection. Pet. App. B38-B59, B66-B67.

The district court denied respondents' prayer for relief in most other respects. It awarded only nominal damages, and declined to order respondents' admission to the Law School, having concluded from the evidence that, "in all likelihood, [respondents] would not have been offered admission even under a constitutionally permissible process." Pet. App. B65. The court also de-

[3] Under its general admissions criteria, and absent affirmative action, the Law School's 1992 entering class would have included, at most, a very small number of black and Mexican-American students. Pet. App. B41 & n.60, B47. The district court also found that the effect of eliminating affirmative action at the Law School would be to direct even more minority students to Texas Southern University Law School—the school Texas created, in response to Heman Sweatt's lawsuit, in order to avoid integration of the University of Texas. *Id.* at B47 & n.66.

clined to issue an injunction against the Law School's future consideration of race in the admissions process. The court noted that Law School had, during the course of the litigation, adopted new admissions practices that eliminated the minority subcommittee and the use of differing presumptive admissions standards. The new practices "appear[ed] to remedy the defects the Court ha[d] found in the 1992 procedure"; and, in any event, the application of the new practices was not before the court. *Id.* at B67. The court directed that respondents be permitted to reapply (without fee) for admission to the 1995 entering class under the new admissions practices. *Id.* at B67-B68.

4. Petitioners did not appeal the district court's ruling that the Law School's 1992 admissions process violated equal protection; respondents appealed the district court's denial to them of damages and injunctive relief. The court of appeals reversed.[4] Expressly rejecting the continuing force of this Court's holding in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978), the panel majority held that, no matter how narrowly tailored the process, "the law school may not use race as a factor in law school admissions." Pet. App. A3.

The court of appeals concluded that this Court's opinions since *Bakke* leave no room for the view that a law school may ever take race into account for the purpose of obtaining the educational benefits of a diverse student population. Although none of the cases cited by the panel majority involved school admissions standards, the panel

[4] The court of appeals affirmed the district court's order denying the request of two black student groups to intervene for the purpose of introducing evidence of discriminatory effects of the Law School's current admissions procedures. Those denied intervention have filed a petition (No. 95-1845) seeking review of that decision.

majority read them to establish that, irrespective of context, remedying past discrimination is the only governmental interest that may warrant consideration of race. Pet. App. A24-A26.

The court then rejected, as insufficiently compelling, the Law School's and State's interest in remedying the effects of *de jure* segregation in the Texas system of public education. It held that, just as "a state does not have a compelling state interest in remedying the effects of past *societal* discrimination," a particular state actor has no governmental interest in remedying official discrimination that has occurred at other levels of state government. Pet. App. A35, A36-A40. Past discrimination in Texas's primary and secondary schools, in its system of higher education, or at the University of Texas itself could not, in the court's view, "justify the present consideration of race in law school admissions." *Id.* at A45.

With regard to the Law School's interest in remedying its own history of official discrimination, the majority held that neither the Law School's reputation as a "white" institution, nor its hostile racial climate, justify consideration of race in its admissions process. Those conditions result, in its view, from (respectively) mere "knowledge of historical fact" and "present societal discrimination." Pet. App. A42.

With respect to certain forms of relief sought by respondents, the court of appeals concluded that the district court erred in placing the burden of proof on respondents to demonstrate that they would have been admitted to the Law School under a constitutionally permissible admissions policy. Pet. App. A48-A51. It instructed that each respondent must, on remand, be awarded admission to the Law School and given the opportunity to establish monetary damages, unless the Law

School proves that that respondent would not have been admitted in 1992 under a completely race-blind procedure. *Id.* at A51-A52. The court of appeals further directed that, should they choose to reapply, respondents "are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race." *Id.* at A54.

Finally, the court of appeals affirmed the district court's denial of prospective injunctive relief, "confident that the conscientious administration at the school, as well as its attorneys, w[ould] heed the directives contained in [its] opinion." Pet. App. A55. It cautioned, however, "that if the law school continues to operate a * * * racial classification system in the future, its actors could be subject to actual and punitive damages." *Ibid.*

Judge Weiner concurred only in the judgment. Pet. App. A63-A75. He saw no need in this case to determine whether diversity is a compelling governmental interest in the graduate school context, *id.* at A63-A70, and (noting that respondents had challenged only the Law School's 1992 admissions policy), faulted the majority for issuing what amounted to a "de facto" prospective injunction, *id.* at A73.

Considering the matter *sua sponte*, the court of appeals denied rehearing en banc. Pet. App. C1-C3. Seven of the Circuit's sixteen active judges dissented from the denial.[5] *Id.* at E1-E11. Chief Judge Politz's dissenting opinion argued that the "radical implications" and "monumental import" of the case demanded en banc review, *id.* at E2, and criticized the panel for "stringing together pieces and shards of recent Supreme Court opinions * * * as a justification for overruling *Bakke*," *id.* at E3. Judge Stewart, writing separately, noted that

[5] Judge Garza did not participate in the decision. Pet. App. C3.

official segregation had occurred at the Law School in the relatively recent past, and stressed the need to carefully consider that legacy when judging the lawfulness of the school's present remedial efforts. *Id.* at E9-E11.

ARGUMENT

The court of appeals has flatly held that the University of Texas School of Law may not consider the race of applicants as a relevant factor in making its admissions decisions. If left unreviewed, this decision will effectively eliminate all affirmative action admissions programs in higher education within the Fifth Circuit.[6] The court of appeals recognized that its decision is inconsistent with the holding of this Court in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978). By disregarding two decades of established law under *Bakke*, the decision has already created substantial confusion and upheaval among colleges and universities nationwide.[7] It also calls into question the lawfulness of existing Department of Education policies and regulations, and interferes with the federal government's efforts to obtain voluntary compliance by the States with

[6] Because the constraints imposed by Title VI on affirmative action programs are the same as those imposed by the Constitution, see *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992), the decision affects private colleges and universities that receive federal assistance as well as state institutions. We are informed by the National Center for Education Statistics, within the Department of Education, that there are more than 240 colleges and universities offering four-year degrees in Texas, Louisiana, and Mississippi.

[7] The Attorney General of one State outside the Fifth Circuit (Georgia) has already recommended that affirmative action policies in the State's colleges and universities be revised or eliminated in light of the decision below. See William H. Honan, *New Attack on Race-Based Admissions*, N.Y. Times, Apr. 10, 1996, at B8.

their desegregation obligations. The decision below thus raises issues of national importance that call for this Court's review.

1. The court of appeals' conclusion that the Law School has no compelling interest that warrants its consideration of race or national origin in its admissions process cannot be dismissed as mere "statements in [an] opinion[]." *California* v. *Rooney*, 483 U.S. 307, 311 (1987). That conclusion was essential to the terms of the court's remand order. In remanding the case to the district court to consider remedy, the court of appeals ruled that, for relief to be denied to a respondent, the Law School must prove that that respondent would not have been admitted under what the court of appeals held, in the liability portion of its opinion, to be the only constitutionally permissible admissions policy, i.e., a completely "race-blind system." Pet. App. A51. The court of appeals' conclusion that the Law School may not constitutionally consider race in admissions was therefore an essential part of the court's holding, and not merely "unfortunate dicta" (*id.* at E8).[8]

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[8] Petitioners suggest (Pet. 22-24) that the Eleventh Amendment bars federal courts jurisdiction in suits against the States under Title VI. Even if that were so, the district court would have jurisdiction to afford prospective injunctive relief (in the form of admission to the Law School) against the individual petitioners in their official capacities under 42 U.S.C. 1983. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Such relief is not barred by sovereign immunity. See *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1131 nn. 14, 16 (1996).

In any event, Texas has no sovereign immunity from suits brought under Title VI. In 1986, Congress, "act[ing] pursuant to a valid exercise of power," *Seminole Tribe*, 116 S. Ct. at 1123, expressly abrogated the States' Eleventh Amendment immunity under Title VI. See Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845, codified at 42 U.S.C. 2000d-7; see also *Franklin* v. *Gwinnett Cty. Public Schools*, 503 U.S. 60, 72-73 (1992). Section 2000d-7 was enacted in response to this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242-243 (1985). It provides that a "state shall not be immune under the Eleventh Amendment * * * from suit in Federal Court for a violation of * * * Title VI." The legislative history of the provision shows that Congress acted pursuant to its authority under Section 5 of the Fourteenth Amendment. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986); 131 Cong. Rec. 22,346 (1985); 132 Cong. Rec. 28,624 (1986). The only court of appeals to consider the issue upheld Section 2000d-7 against an Eleventh Amendment challenge on that basis. See *United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990). In addition, and contrary to petitioners' suggestion (Pet. 24 n.17), Congress's explicit decision that the States be subject to suit in federal court under Section 2000d-7 "makes it clear to the [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). See *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

Moreover, although the court of appeals declined to authorize a formal injunction at this time barring the Law School from any consideration of race or national origin in its admissions program, the court's opinion effectively amounts to such an injunction. The court directed that, "[i]n accordance with [its] opinion," respondents must be permitted to reapply "under a system of admissions that will not discriminate against anyone on the basis of race," Pet. App. A54, and expressly warned that the Law School's failure to "heed" the "directives contained within [its] opinion" would provide cause for punitive damages. *Id.* at A55.[9] "[W]hen confronted with

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[9] The panel subsequently noted the "necessity" that petitioners "implement as soon as possible th[e] court's *mandate* to end racial discrimination in admissions at the law school." Pet. App. D5 (emphasis added). The court of appeals would also likely conclude that the panel's "directives" established the law of the circuit with sufficient clarity to foreclose a claim of qualified immunity for university or state officials sued for damages for considering race as a factor in admissions deci-

such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it." *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 (1970). Having "all of the substantive earmarks of an injunction," the court of appeals' opinion is correctly treated as such. Pet. App. A73.[10]

2. In *Bakke*, this Court affirmed the judgment of the California Supreme Court holding unconstitutional a state medical school's use of a rigid race-based admissions quota, but reversed that portion of the state-court judgment that completely prohibited the school from considering race in its admissions process. Five Justices agreed in *Bakke* that the medical school could constitutionally consider race under a "properly devised admissions program." 438 U.S. at 320 (opinion of Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part, and dissenting in part).[11] *Bakke*'s landmark holding has guided the admissions policies of public and private institutions of higher education in the United States for almost two decades. The panel below nevertheless declared that *Bakke*'s holding is no longer good law.

Justice Powell's opinion in *Bakke* applied strict scrutiny. *Bakke*, 438 U.S. at 291. It rested its approval of the use of race in the context of a properly devised admissions program on the educational benefits of a diverse student body. *Id.* at 311-315. This Court has cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990), overruled in part, *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097 (1995); see also *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

The court of appeals declined to follow *Bakke* because, in its view, a majority of this Court has since rejected the diversity rationale as a permissible predicate for affirmative action. See Pet. App. A17-A33. In so concluding, the court of appeals relied on cases involving affirmative action in public contracting, such as *Adarand*, *supra*, and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), rather than decisions regarding higher education

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sions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Elder* v. *Holloway*, 114 S. Ct. 1019, 1021 (1994).

[10] Petitioners correctly assert (Pet. 28-29) that respondents lacked standing to assert the rights of nonparties, and that the court of appeals therefore had no jurisdiction to issue injunctive relief barring consideration of race by the Law School with respect to other applicants. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[T]he Article III question is not whether the requested relief would [affect] the world at large, but whether [respondents] ha[ve] a stake in the relief."). The court of appeals' directives were also related, however, to the court's instruction that respondents personally be accorded the right to reapply to the Law School under a race-blind system. Pet. App. A54. To the extent that any respondent demonstrated "a real and immediate" possibility that he or she would in fact reapply, that would provide standing and establish the court of appeals' jurisdiction to afford individual prospective injunctive relief. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2104 (1995).

[11] The remaining Justices would have affirmed the state court's holding that Bakke's exclusion from the medical school violated Title VI. They expressly declined to address the constitutionality of the admissions program. See 438 U.S. at 408-409 (Stevens, J., concurring in the judgment in part and dissenting in part).

admissions programs.[12] The Court's suggestion in *Croson* that racial classifications should be "reserved for remedial settings," 488 U.S. at 493, was made in the context of public contracting, where redress of past discrimination may be the only compelling governmental purpose for the use of racial preferences. See *id.* at 512-513 (Stevens, J., concurring). Affirmative action may also serve vital remedial interests in the university admissions setting. See pp. 16-20 , *infra*. It may, in addition, contribute to—indeed be necessary to—achieving the goal of educational diversity,[13] a goal not relevant in the awarding of construction contracts.

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[12] *Adarand* and *Croson* established that strict scrutiny applies to race-conscious affirmative action programs. The Court expressly noted in *Adarand* that Justice Powell also applied "the most exacting judicial examination" when he concluded in *Bakke* that diversity constitutes a sufficiently weighty state interest in the context of admissions in higher education. See *Adarand*, 115 S. Ct. at 2108 (quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J.)).

[13] The Department of Education has relied upon Justice Powell's opinion in *Bakke* as a basis for concluding that diversity-based affirmative action in higher education does not violate Title VI, so long as it meets the constitutional standards described by Justice Powell. See 59 Fed. Reg. 8756, 8760-8762 (1994). Relying on Justice Powell's opinion in *Bakke*, the district court concluded in this case that the Law School's 1992 practice was constitutionally infirm, not because it considered race as a factor in admissions, but because it utilized a "separate process" that "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race." Pet. App. B59. We agree that the 1992 "separate process" policy was constitutionally flawed in this manner. Petitioners did not appeal the district court's ruling with respect to the 1992 policy, "having abandoned that policy in 1994 in favor of one that treated race as simply a factor in the individualized consideration and comparison of applicants to the Law School." Pet. 3-4. The constitutionality of the means by which the Law School has taken race into account is therefore not at issue. Rather, the question here is whether

Justice Powell's observation in *Bakke* (a case involving medical school admissions) that "an otherwise qualified * * * student with a particular background * * * may bring to a professional school * * * experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates," 438 U.S. at 314,[14] has even greater force with regard to schools that educate and train lawyers. Law students cannot effectively be trained "in isolation from the individuals and institutions with which the law interacts." *Sweatt*, 339 U.S. at 634. This Court correctly concluded in *Sweatt* that a black student could not receive an effective legal education in Texas while being kept separate from "members of racial groups which number[ed] 85% of the population of the State." *Ibid.* The predominantly white University of Texas School of Law may similarly conclude today that, absent racial diversity in its classrooms, its students will not effectively be prepared to be lawyers in Texas's (or the Nation's) racially diverse society.

The court of appeals' suggestion that the Law School may constitutionally consider non-racial factors, including economic and social background, that might be

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the Law School may consider race at all in making its admissions decisions.

[14] Justice Powell recognized in *Bakke*, 438 U.S. at 312 n.48 (quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly (Sept. 26, 1977) at 9), that

> a great deal of learning occurs informally[,] * * * through interactions among students of both sexes; of different races, religions and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

closely correlated with race, Pet. App. A27, A29 n.31, ignores the Law School's compelling educational interest in maintaining a *racially* diverse student body. In the law school admissions context, race is not merely a "proxy for other, more germane bases of classification," *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting), such as economic disadvantage. As the district court found from the evidence at trial, Pet. App. B41, at this time in the history of Texas and the United States, the inclusion in the law school educational process of those who have experienced, and will continue to experience, racial minority status, is essential to achieving meaningful educational diversity. That view does not rest on impermissible racial stereotypes; it does not equate race with particular viewpoints; and it does not presume that all individuals of a particular race act or think alike. An admissions program that values racial diversity recognizes that a black (or Mexican-American) student reared in this country is likely to have had different life experiences, *precisely because of his or her race*, than an otherwise similarly situated white student. What each individual takes from those life experiences is unique; indeed, students may benefit from diversity by learning first-hand that "particular and distinct viewpoint[s] [do *not*] inhere in certain racial groups." *Metro Broadcasting*, 497 U.S. at 618 (O'Connor, J., dissenting). Cf. *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting)[15]

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[15] Assuming that a law school may constitutionally consider race as a factor for purposes of educational diversity, the means by which it does so must be narrowly tailored to advance that interest, in order to ensure that the school's race-sensitivity does not reflect or promote racial stereotypes, see *Adarand*, 488 U.S. at 493, or impose disproportionate harm on nonminority applicants, see *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring). See also 59 Fed. Reg. at 8760-8762. A law school may not, for example, employ rigid numerical goals amounting to fixed quotas or set-asides, which deny each applicant's right to be treated as an individual in the admissions process in a pool of applicants of all races. See *Bakke*, 438 U.S. at 318-320 (opinion of Powell, J.).

3. The legitimacy of the Law School's concern for diversity in this case is underscored by the history of educational discrimination in Texas. The vestiges of that history have kept many black and Mexican-American students separated from white students for most of their educational lives. In prohibiting the use of race in Law School admissions, the court of appeals acknowledged that official discrimination against minorities has existed in the State's public schools, see Pet. App. A39, and it did not dispute the district court's finding (*id.* at B45) that "[t]he effects of the State's past *de jure* segregation in the education system are reflected in the low enrollment of minorities in professional schools, including the law school." The court held, however, that the Law School's constitutionally valid remedial interests extend no further than redressing the effects of its *own* prior racial discrimination. *Id.* at A38 n.43. That conclusion finds no support in this Court's jurisprudence; it ignores the close nexus between a state university and the State's public schools; and it represents an unwarranted intrusion into state governmental structures.

a. The practical effect of the court of appeals' holding will be to return the most prestigious institutions within state university systems to their former "white" status, and thereby to prolong, rather than eliminate, the vestiges of unconstitutional exclusion and segregation. That result ignores Texas's strong interest in eliminating the vestiges of state-sponsored discrimination—an interest

that is not satisfied by the mere adoption of race-neutral policies. See *Fordice*, 505 U.S. at 721, 729-732.[16]

The court of appeals' position is not supported by this Court's holding in *Croson* that the City of Richmond had no compelling interest in remedying past discrimination in the national construction industry. 488 U.S. at 498. The Law School was not motivated here by generalized assertions of societal discrimination, which is an impermissible ground for affirmative action. Rather, it was attempting to address the effects on the Law School of the State's former *de jure* segregated system of public education. The court recognized that " '[a]pplicants do not arrive at the admissions office of a professional school in a vacuum.' " Pet. App. B43. Texas has imposed a requirement that most (in 1992, 85%; now, 80%) of the Law School's entering class be Texas residents. *Id.* at B23-B24 & n.33. Most students considered for admission in 1992 would therefore have attended Texas public schools during a period (the 1970s and 1980s) when many of the State's primary and secondary schools remained segregated as a result of prior *de jure* segregation. The district court here found that the effects of that segregation "are reflected in the low enrollment of minorities in * * * the law school." Pet. App. B45.

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[16] This Court has "repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination." *Metro Broadcasting*, 497 U.S. at 611 (O'Connor, J., dissenting). States and state subdivisions have both the "constitutional *duty* to take affirmative steps to eliminate the continuing effects of [their] past unconstitutional discrimination," *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring); *id.* at 280 (plurality opinion), and the constitutional "authority to eradicate the effects of [even] private discrimination" within their respective jurisdictions, *Croson*, 488 U.S. 491-492 (opinion of O'Connor, J.).

If the Law School is completely prohibited from taking those effects into account in its admissions process, the legacy of *de jure* discrimination will be left unremedied for another generation, and the Law School itself will be forced to become "a 'passive participant' in a system of racial exclusion," using "public dollars, drawn from the tax contributions of all citizens" to finance unlawful segregation. *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.); cf. *Gaston Cty.* v. *United States*, 395 U.S. 285, 296-297 (1969) (Harlan, J.) (given the history of official segregation and systemic deprivation of educational opportunities to blacks, " '[i]mpartial' administration of the literacy test today would serve only to perpetuate * * * inequalities"). The Constitution does not prohibit a State from attempting to compensate for injuries at one stage of the educational process through a remedial program at a later stage.[17]

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[17] The Court stated in *Croson* that "discrimination in primary and secondary schooling" cannot justify "a rigid racial preference in medical school admissions." 488 U.S. at 499. The Court there was apparently adverting to Justice Powell's conclusion in *Bakke* that the medical school could not rely on generalized societal discrimination (including generalized discrimination in education) to justify its use of a fixed numerical quota. In this case, the University of Texas School of Law is attempting to remedy recent, documented segregation in Texas's primary and secondary schools. The court of appeals has, moreover, prohibited *all* use of race in the admissions process—not only the use of fixed or rigid quotas.

As petitioners note (Pet. 18 & n.11), the court of appeals' view that a school of higher education may not take into account in its admissions process the effects of segregation at the primary and secondary school levels conflicts with the position taken by the Sixth Circuit in *Geier* v. *Alexander*, 801 F.2d 799 (1986). In *Geier*, the court of appeals upheld the University of Tennessee's consideration of race in admissions to a pre-professional program, on the ground that the university was not "seek[ing] to remedy some amorphous 'societal' wrong, but rather

b. There is no warrant for the court of appeals' insistence that, "for the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects." Pet. App. A39. "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite" to the adoption of an affirmative action plan. *Wygant*, 476 U.S. at 289 (O'Connor J., concurring). The unlawful segregation of blacks and Mexican-Americans in Texas's public school systems is an undisputed matter of public record. In light of its extensive experience with students drawn from the State's public schools, the Law School is particularly well placed to assess the effects of that segregation on its minority applicants.

Moreover, "how power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.). Here, the Texas legislature, "which has ultimate control over the school, has delegated its 'management and control' to the regents of the University of Texas system," Pet. App. B40 n.44, and the Board of Regents has in turn largely delegated the responsibility to fashion lawful and educationally beneficial admissions policies to the individual schools within the system. The Constitution does not require (or, indeed, permit) federal courts to second-guess the wisdom of those delegations.[18]

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addressing "the continuing effects of past practices that adversely affected black[s] * * * as they moved through the public school systems and the higher education system of the state." 801 F.2d at 809-810.

[18] See, *e.g.*, *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (Harlan, J.); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be granted to review the court of appeals' holding that the University of Texas School of Law may not consider race or national origin in any manner in its admissions process.

Respectfully submitted.

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MAY 1996